



April 4, 2016

Via FOIA Online to:

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

Re: FOIA Request for Records Pertaining to the Definition of “Waters of the United States”

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and applicable Environmental Protection Agency regulations at 40 C.F.R. §§ 2.100-2.406.

I. Description of Records Sought

Please produce records¹ of the following types in EPA’s possession, custody or control that:

1. Identify any instance after January 1, 2006, in which any water body was deemed not to be a “water of the United States” under the Clean Water Act, 33 U.S.C. § 1362(7), because the water body was considered to be a “waste treatment system,” as used in 33 C.F.R. § 328.3; 40 C.F.R. §§ 110.1, 117.1, 122.2, 230.3, 232.2 & 300.5; and 40 C.F.R. pt. 300 app. E.
2. Reflect any estimate of how often, in the future, water bodies will be deemed not to be “waters of the United States” because they are considered to be “waste treatment systems,” as that term is used in the Clean Water Rule, 80 Fed. Reg. 37,054 (June 29, 2015).

¹ “Records” means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any EPA office, including, but not limited to, EPA Headquarters offices, and specifically including EPA offices in possession of responsive records.

3. Pertain to the past or expected environmental or public health consequences of deeming water bodies not to be “waters of the United States” because they are considered to be “waste treatment systems.”
4. Reflect any estimate of the prevalence of, or any description or identification of the location of, “[w]aters being used for established normal farming, ranching, and silviculture activities,” as that term is used in the Clean Water Rule, 80 Fed. Reg. 37,054 (June 29, 2015).
5. Pertain to or estimate the amount of “[w]aters being used for established normal farming, ranching, and silviculture activities,” as that term is used in the Clean Water Rule, that will be deemed to be “waters of the United States.”
6. Pertain to the expected environmental or public health consequences of the Clean Water Rule’s provision concerning “[w]aters being used for established normal farming, ranching, and silviculture activities.”
7. Identify any instance in which a water body was deemed to be a “water of the United States,” and was:
 - a. Found to have a “significant nexus,” as that term was explained in the memoranda dated December 2, 2008, and June 6, 2007, and titled “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States”; and
 - b. Located more than 4,000 feet from any: waters that were currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including any waters that are subject to the ebb and flow of the tide; interstate waters, including interstate wetlands; or the territorial seas.
8. Pertain to or estimate the amount of waters that:
 - a. Would have been found to have a “significant nexus,” as that term is defined in the Clean Water Rule, 80 Fed. Reg. 37,054 (June 29, 2015); but
 - b. Are located more than 4,000 feet from any: waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including any waters that are subject to the ebb and flow of the tide; interstate waters, including interstate wetlands; or the territorial seas.
9. Pertain to the expected environmental or public health consequences of the Clean Water Rule’s provision concerning waters located more than 4,000 feet from any: waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including any waters that are subject to the ebb and flow of the tide; interstate waters, including interstate wetlands; or the territorial seas.

II. Request for a Fee Waiver

NRDC requests that EPA waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without charge “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); see 40 C.F.R. § 2.107(l)(1). The requested

disclosure would meet both of these requirements. In addition, NRDC qualifies as “a representative of the news media” entitled to a reduction of fees under FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see* 40 C.F.R. § 2.107(c)(1)(iii).

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). Each of the four factors used by EPA to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 40 C.F.R. § 2.107(l)(2).

1. Subject of the request

The records requested here are materials pertaining to the question of what water bodies the federal government will recognize as “waters of the United States,” entitled to pollution protection pursuant to numerous programs in the Clean Water Act. In particular, the records requested will promote greater understanding of the impact of the rulemaking action by the Environmental Protection Agency and the U.S. Army Corps of Engineers known as the Clean Water Rule. 80 Fed. Reg. 37,054 (June 29, 2015). The requested records thus directly concern “the operations or activities of the government.” 40 C.F.R. § 2.107(l)(2)(i).

2. Informative value of the information to be disclosed

The requested records are likely to enhance the public’s understanding of government operations and activities. 40 C.F.R. § 2.107(l)(2)(ii). The requested records relate to provisions of the Clean Water Rule that exclude from automatic federal protection, or from federal protection altogether, certain categories of water bodies. The public does not currently possess information regarding the impact of these provisions on water quality, or on people’s health and welfare. There is more than a reasonable likelihood that these records have informative value to the public. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

We believe that the records requested are not currently in the public domain. Their disclosure would thus meaningfully inform public understanding with respect to the Clean Water Rule, as well as its environmental and public health and welfare impacts, as further discussed below. However, if EPA were to conclude that some of the requested records are publicly available, NRDC would like to discuss that conclusion and might agree to exclude such records from this request. In particular, if any responsive records are already contained in the electronic docket for the Clean Water Rule, EPA-HQ-OW-2011-0880, EPA need not produce such records; it would suffice to identify the docket number of the responsive record.

3. Contribution to an understanding of the subject by the public is likely to result from disclosure.

Because NRDC is a “representative of the news media,” as explained in Part II.C below, EPA must presume that this disclosure is likely to contribute to public understanding of its subject. 40 C.F.R. § 2.107(l)(2)(iii).

However, even if NRDC were not a media requester, NRDC’s expertise in the scope and importance of protections under the Clean Water Act, extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that NRDC has the ability and desire to use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its member base and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information requested here. With respect to the Clean Water Rule and the effective implementation of the Clean Water Act, NRDC’s more than one million members and online activists represent “a broad audience of persons interested in the subject,” and when combined with NRDC’s communications to the public at large, the likely audience of interested persons to be reached is certainly “reasonably broad.” 40 C.F.R. § 2.107(l)(2)(iii). As NRDC’s long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

NRDC has the ability to disseminate information collected from this FOIA request through many channels. As of December 2014, these include, but are not limited to the following:

- NRDC’s website, available at <http://www.nrdc.org> (homepage at Att. 1), is updated daily and draws approximately 1,500,000 page views and 712,000 unique visitors per month.
- *OnEarth* magazine (sample issue at Att. 2) is published as a bimonthly digital magazine, and is available free of charge at <http://www.onearth.org>. The site is updated regularly and also includes *Earthwire*, a daily newsfeed (Att. 3). It receives more than 99,000 unique visitors per month.
- *Nature’s Voice* newsletter on current environmental issues (sample issue at Att. 4) is distributed four times a year to NRDC’s more than one million members and online activists, and is available online at <http://www.nrdc.org/naturesvoice/default.asp> (Att. 5).

- *Activist Network* and *BioGems* email lists (sample email at Att. 6) include more than 1.7 million members who receive biweekly information on urgent environmental issues. This information is also made available through NRDC's online Action Center at <http://www.nrdc.org/action/default.asp> (Att. 7).
- *NRDC This Week* is a monthly electronic environmental newsletter distributed by email to more than 65,000 subscribers, at <http://www.nrdc.org/newsletter> (Att. 8).
- "Switchboard," available at <http://switchboard.nrdc.org> (Att. 9), is a staff blogging site that is updated daily and features more than 280 bloggers writing about current environmental issues. The blogs draw approximately 138,000 page views and 90,000 unique visitors per month; Switchboard's RSS feeds have approximately 4,750 subscribers; and Switchboard posts appear on websites of other major internet media outlets, such as "The Huffington Post," at <http://www.huffingtonpost.com> (sample post at Att. 10).
- NRDC's profiles on Facebook, at <http://www.facebook.com/nrdc.org> (Att. 11), and Twitter, at <http://www.twitter.com/nrdc> (Att. 12), are updated daily and have approximately 301,000 fans and 158,000 followers, respectively.

NRDC issues press releases, issue papers, and reports; directs and produces movies, such as *Stories from the Gulf*, narrated by Robert Redford, and *Acid Test*, narrated by Sigourney Weaver; participates in press conferences and interviews with reporters and editorial writers; and has more than forty staff members dedicated to communications work.

NRDC employees provide Congressional testimony; appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. A few examples are provided below:

- Research article, "The requirement to rebuild US fish stocks: Is it working?" *Marine Policy*, July 2014 (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell) (Att. 13);
- Issue brief, "The Untapped Potential of California's Water Supply: Efficiency, Reuse, and Stormwater," June 2014 (co-authored by NRDC Water Program Senior Attorney Kate Poole and Senior Policy Analyst Ed Osann) (Att. 14); see also "Saving Water in California," *N.Y. Times*, July 9, 2014 (discussing the report's estimates) (Att. 15);
- Article, "Waves of phony charges over new clean water safeguards," *The Hill*, June 17, 2014 (by NRDC Executive Director Peter Lehner) (Att. 16);
- Article, "Don't Buy the Smear of the EPA," *L.A. Times*, June 3, 2014 (by NRDC President Frances Beinecke) (Att. 17);
- Transcript, "Conservationists Call For Quiet: The Ocean Is Too Loud!" Nat'l Pub. Radio, *All Things Considered*, July 28, 2013 (featuring NRDC Marine Mammal Protection Program Director Michael Jasny) (Att. 18);

- Testimony of David Doniger, NRDC Climate and Air Program Policy Director and Senior Attorney, before the United States House Subcommittee on Energy and Power, June 19, 2012 (Att. 19);
- Article, “Pollution Still a Hazard to U.S. Beaches,” CBS, *CBS NEWS*, July 29, 2009 (featuring former NRDC Water Program Co-Director Nancy Stoner) (Att. 20);
- Conference brochure, “World Business Summit on Climate Change,” May 24-26, 2009 (featuring former NRDC Director for Market Innovation Rick Duke at 9) (Att. 21);
- Article, “Is there a ‘proper level’ of compliance with environmental law?” *Trends: ABA Section of Environment, Energy, and Resources Newsletter*, Jan./Feb. 2008 (authored by NRDC Senior Attorney Michael Wall) (Att. 22);
- NRDC Document Bank, <http://docs.nrdc.org/> (Att. 23).

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

- (1) In April 2014, NRDC relied on FOIA documents for a report on potentially unsafe chemicals added to food, without the safety oversight of the Food and Drug Administration or the notification of the public. The report, titled *Generally Recognized as Secret: Chemicals Added to Food in the United States*, reveals concerns within the agency about several chemicals used as ingredients in food that manufacturers claim are “generally recognized as safe” (Att. 24). *See also* Kimberly Kindy, “Are secret, dangerous ingredients in your food?” *Wash. Post*, Apr. 7, 2014 (discussing NRDC’s report) (Att. 25).
- (2) NRDC obtained, through FOIA, FDA review documents on the nontherapeutic use of antibiotic additives in livestock and poultry feed. In January 2014, NRDC published a report, titled *Playing Chicken with Antibiotics*, which is based on the documents obtained, and reveals decades of reluctance on FDA’s part to ensure the safety of these drug additives (Att. 26). *See also* P.J. Huffstutter and Brian Grow, “Drug critic slams FDA over antibiotic oversight in meat production,” *Reuters*, Jan. 27, 2014 (discussing NRDC’s report) (Att. 27).
- (3) NRDC has used White House documents obtained through FOIA and from other sources to inform the public about EPA’s decision not to protect wildlife and workers from the pesticide atrazine in the face of industry pressure to keep atrazine on the market. *See Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States*, <http://www.nrdc.org/health/atrazine/files/atrazine10.pdf> (Apr. 2010) (update to 2009 report) (Att. 28); *see also* William Souder, “It’s Not Easy

Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?" *Harper's Bazaar*, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC) (Att. 29).

- (4) NRDC incorporated information obtained through FOIA into a report, available at <http://www.nrdc.org/wildlife/marine/sound/contents.asp>, on the impacts of military sonar and other industrial noise pollution on marine life. *See Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life* (Nov. 2005) (update to 1999 report) (Att. 30). The report also relied upon and synthesized information from other sources. Since the report's publication, the sonar issue has continued to attract widespread public attention. *See, e.g.*, "Protest Raised over New Tests of Naval Sonar," Nat'l Pub. Radio, *All Things Considered*, July 24, 2007 (transcript at Att. 31).
- (5) NRDC scientists have used information obtained through FOIA to publish analyses of the United States' and other nations' nuclear weapons programs. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States' plans to deploy a ballistic missile system and the implications for global security. *See* Hans M. Kristensen, Matthew G. McKinzie, and Robert S. Norris, "The Protection Paradox," *Bulletin of Atomic Scientists*, Mar./Apr. 2004 (Att. 32).
- (6) NRDC obtained through FOIA, and made public, records of the operations of the Bush administration's Energy Task Force, along with analysis of selected excerpts and links to the administration's index of withheld documents (Att. 33). NRDC's efforts cast light on an issue of considerable public interest. *See, e.g.*, Elizabeth Shogren, "Bush Gets One-Two Punch on Energy," *L.A. Times*, Mar. 28, 2002, at A22 (Att. 34).
- (7) Through FOIA, NRDC obtained a memorandum by ExxonMobil, advocating the replacement of the sitting head of the Intergovernmental Panel on Climate Change, and used the document to help inform the public about what may have been behind the Bush administration's decision to replace Dr. Robert Watson. *See* NRDC Press Release and attached Exxon memorandum, "Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel," Apr. 3, 2002 (Att. 35); Elizabeth Shogren, "Charges Fly Over Science Panel Pick," *L.A. Times*, Apr. 4, 2002, at A19 (Att. 36).
- (8) Through FOIA and other sources, NRDC obtained information on nationwide levels of arsenic in drinking water and used it in a report, *Arsenic and Old Laws* (2000), available in print and online at <http://www.nrdc.org/water/drinking/arsenic/aolinx.asp> (Att. 37). The report guided interested members of the public on how to learn more about arsenic in their own drinking water supplies. *Id.*; *see also* Steve

LaRue, "EPA Aims to Cut Levels of Arsenic in Well Water," *San Diego Union-Tribune*, June 5, 2000, at B1 (referencing NRDC report) (Att. 38).²

As these examples demonstrate, NRDC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to contribute to the public's understanding of the subject.

4. *Significance of the contribution to public understanding*

The records requested shed light on a matter of considerable public interest and concern: the EPA/Army Corps Clean Water Rule. The agencies themselves have recognized the significance of the rule; a press release issued when the rule was signed called it "an historic step for the protection of clean water," and quoted Assistant Secretary Darcy as saying that it is a "generational rule." U.S. EPA, News Release, "Clean Water Rule Protects Streams and Wetlands Critical to Public Health, Communities, and Economy" (May 27, 2015), available at <https://yosemite.epa.gov/opa/admpress.nsf/3881d73f4d4aaa0b85257359003f5348/62295cddd6c6b45685257e52004fac97!OpenDocument>. Furthermore, this rule has been the subject of enormous public attention, as the media coverage of the agencies' action attached to this request reveals:

- Coral Davenport, "Obama Announces New Rule Limiting Water Pollution," *The New York Times*, May 27, 2015 (Ex. A).
- Darryl Fears, "EPA strengthens federal protections for small streams," *The Washington Post*, May 27, 2015 (Ex. B).
- William Yardley, "With new EPA water rule, Obama again takes executive action on environment," *Los Angeles Times*, May 25, 2015 (Ex. C).
- Renee Lewis, "EPA pushes to solidify federal power to protect streams, wetlands," *Al Jazeera America*, May 22, 2015 (Ex. D).
- Maria Gallucci, "Obama Administration Finalizes Sweeping EPA Clean Water Rule to Protect US Wetlands and Waterways," *International Business Times*, May 27, 2015 (Ex. E).
- Bruce Finley, "EPA finalizes new clean-water rule protecting thousands more waterways," *The Denver Post*, May 27, 2015 (Ex. F).
- Robert B. Semple, Jr., "Good News for the Nation's Waterways," *The New York Times*, May 22, 2015 (Ex. G).

² There are numerous other examples of national news articles that were based in part on documents NRDC obtained through FOIA. See, e.g., Felicity Barringer, "Science Panel Issues Report on Exposure to Pollutant," *N.Y. Times*, Jan. 11, 2005 (Att. 39); Katharine Q. Seelye, "Draft of Air Rule is Said to Exempt Many Old Plants," *N.Y. Times*, Aug. 22, 2003 (Att. 40); Don Van Natta, Jr., "E-Mail Suggests Energy Official Encouraged Lobbyist on Policy," *N.Y. Times*, Apr. 27, 2002 (Att. 41).

It is noteworthy that these media pieces represent but a small fraction of the coverage of the issue.

Public understanding of the Clean Water Rule, as well as its environmental and public health impacts, would be significantly enhanced by disclosure of the requested records concerning several provisions of the Clean Water Rule. 40 C.F.R. § 2.107(l)(2)(iv). Disclosure would help the public more effectively evaluate whether the Clean Water Rule adequately protects water bodies historically protected by the Clean Water Act, and the impacts of decisions made by the agencies in promulgating the Clean Water Rule. In particular, disclosure is critical because, based on NRDC's review of the public record of the Clean Water Rule, the public lacks any information about the number of water bodies affected by, or the pollution consequences of, provisions that exclude certain water bodies from the Clean Water Act's protections or establish weaker safeguards for others.

B. NRDC Satisfies the Second Fee Waiver Requirement

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. "Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" *Rossotti*, 326 F.3d at 1312 (internal citation omitted); see *Natural Res. Def. Council v. United States Env'tl. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about the Clean Water Rule's adequacy in protecting important water resources. As noted at Part II.A, any work done by EPA on the Clean Water Rule relates to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of the Clean Water Rule and its stringency, as well as associated impacts on human health and the environment.

C. NRDC Is a Media Requester

Even if EPA denies a public interest waiver of all costs and fees, NRDC is a representative of the news media entitled to a reduction of fees under FOIA, 5 U.S.C. § 552(a)(4)(A)(ii), and EPA's FOIA regulations, 40 C.F.R. § 2.107(c)(1)(iii); see also 40 C.F.R. § 2.107(b)(6) (defining "[r]epresentative of the news media"). A representative of the news media is "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); see also *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a "non-profit public interest organization" qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public); Letter from Alexander C. Morris, FOIA Officer, United States Dep't of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (Att. 42) (granting NRDC media requester status).

NRDC is in part organized and operated to gather and publish or transmit news to the public. As described earlier in this request, NRDC publishes a bimonthly digital magazine, *OnEarth*, which has won numerous news media awards, including the Independent Press Award for Best Environmental Coverage and for General Excellence, a Gold Eddie Award for editorial excellence among magazines, and the Phillip D. Reed Memorial Award for Outstanding Writing on the Southern Environment. NRDC also publishes a regular newsletter for its more than one million members and online activists; issues other electronic newsletters, action alerts, public reports, and analyses; and maintains free online libraries of these publications. See 40 C.F.R. § 2.107(b)(6) (“Examples of news media include . . . publishers of periodicals.”). NRDC maintains a significant additional communications presence on the internet through its staff blogging site, “Switchboard,” which is updated daily and features more than 250 bloggers writing about current environmental issues, and through daily news messaging on Twitter and Facebook. See OPEN Government Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that “as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities”). The aforementioned publications and media sources routinely include information about current events of interest to the readership and the public. To publish and transmit this news content, NRDC employs more than forty staff members dedicated full-time to communications with the public, including accomplished journalists and editors. These staff members rely on information acquired under FOIA and through other means. Public interest organizations meeting the requirements “are regularly granted news representative status.” *Serv. Women’s Action Network v. Dep’t of Def.*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012) (according media requester status to the American Civil Liberties Union).³

Information obtained as a result of this request will, if appropriately newsworthy, be synthesized with information from other sources and used by NRDC to create and disseminate unique articles, reports, analyses, blogs, tweets, emails, and/or other distinct informational works through one or more of NRDC’s publications or other suitable media channels. NRDC staff gather information from a variety of sources—including documents provided pursuant to FOIA requests—to write original articles and reports that are featured in NRDC’s *OnEarth* magazine, newsletters, blogs, and other NRDC-operated media outlets. See *Cause of Action v. Fed. Trade Comm’n*, 961 F. Supp. 2d 142, 163 (D.D.C. 2013) (explaining that an organization can qualify for media-requester status if it “distributes work to an audience and is especially organized around doing so”). NRDC seeks the requested records to aid its own news-disseminating activities by obtaining, analyzing, and distributing information likely to contribute significantly to public understanding, not to resell the information to other media organizations.

³ To be a representative of the news media, an organization need not *exclusively* perform news-gathering functions. If that were required, major news and entertainment entities like the National Broadcasting Company (NBC) would not qualify as representatives of the news media. This country has a long history, dating back to its founding, of news organizations engaging in public advocacy.

III. Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with EPA's FOIA regulations at 40 C.F.R. § 2.107(c)(1)(iv) for all or a portion of the requested records. *See* 40 C.F.R. § 2.107(l)(4). Please contact me before doing anything that would cause the fee to exceed \$250. NRDC reserves its rights to seek administrative or judicial review of any fee waiver denial.

IV. Conclusion

Please e-mail or (if it is not possible to e-mail) mail the requested records to me at the NRDC office address listed below. Please send them on a rolling basis; EPA's search for—or deliberations concerning—certain records should not delay the production of others that EPA has already retrieved and elected to produce. *See generally* 40 C.F.R. § 2.104 (describing response deadlines). If EPA concludes that any of the records requested here are publicly available, please let me know.

Please do not hesitate to call or e-mail with questions.

Thank you.

Sincerely,

A handwritten signature in blue ink, appearing to be 'J. Devine', with a stylized flourish at the end.

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Enclosures:

Attachments 1 through 42 (single .pdf file)
Exhibits A through G (single .pdf file)